

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

COPY

IN THE MATTER OF:)

(Name omitted),)

Grievant,)

v.)

OFFICE OF INFORMATION)
SERVICES,)

Agency.)

DOCKET NO. 00-01-194

ORDER DISMISSING
APPEAL FOR LACK OF
JURISDICTION

BEFORE Board members Dallas Green, John W. Pitts, and John F. Schmutz, Esquire,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Grievant:

Roy S. Shiels, Esquire
Brown, Shiels, Beauregard & Chasanov
108 East Water Street
P.O. Drawer F
Dover, DE 19903

For the Agency:

Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance appeal was filed by a casual seasonal employee of the Office of Information Services ("Agency" or "OIS") after his employment with that Agency was terminated. The grievance was the subject of an evidentiary hearing at Step 3 of the grievance process under Merit Rule 20.8 on December 13, 1999 and was denied at Step 3 by written decision of the designee of the State Personnel Director on December 16, 1999. The employee, through legal counsel, thereafter filed this appeal with the Merit Employee Relations Board ("Board" or "MERB") on January 3, 2000. The appeal alleged that the employee was terminated without just cause [Merit Rule 15.1] and in violation

of Merit Rule 19.0100 [which prohibits discrimination against "any person" on the basis of non-merit factors]. The appeal was scheduled for hearing before the Board on March 2, 2000. After opening statements by the parties,¹ the Board, on its own motion, raised the issue of its jurisdiction to hear the appeal since both parties had agreed in their opening statements that the appellant was a casual seasonal employee and was therefore exempt from state classified service. The parties also agreed, as they had at Step 3, that "just cause" was not required for OIS to terminate the appellant's employment as a casual seasonal employee.

After considering the arguments from both parties and conducting public deliberations, the quorum of the Board hearing this matter voted unanimously to dismiss the appeal for lack of jurisdiction.

DISCUSSION

It is fundamental that the power and authority of the Board are derived from statute and the Merit Rules, and the Board's jurisdiction extends only to those cases which are properly before it in compliance with the statutes and Merit Rules. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973), *Cunningham v. State of Delaware, Department of Health and Social Services*, Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (ORDER). Also, not everyone who is employed by the State of Delaware has access to the grievance process and to the Merit Employee Relations Board.

¹The issue of which party was the "moving party" under Merit Rule 21.0230 arose in this case since the casual seasonal employee alleged termination without just cause and also discrimination in violation of Merit Rule No. 19 as the basis for the appeal. The Agency was prepared to present its case and proceeded to make opening argument. The Board preliminarily determined to allow the matter to proceed as a disciplinary hearing for purposes of determining whether the hearing would be considered as a private employee disciplinary hearing. In light of the action of the Board dismissing this matter for lack of jurisdiction, the determination of the "moving party" becomes moot. However, the Board will maintain the privacy of the employee in this Order as the identity is not material to the Board's resolution of the jurisdictional question.

Cf. *Brandner v. Delaware State Housing Authority*, Del Super., No. 90A-AU-2, Steele, J. 1990 WL 199826. (It is well settled law that an exempt employee has no standing to grieve under the merit system rules.)

The question of jurisdiction was raised by the Board. The Agency did not move to dismiss this appeal and at the oral argument did not contest the employee's right to bring the grievance. The employee asserts that an appeal to the Board is proper under Merit Rule No. 19.0100 by a casual seasonal employee. However, parties cannot confer power and jurisdiction which otherwise does not exist. *Preform Building Components, Inc. v. Edwards*, Del. Supr., 280 A.2d 697 (1971).

In addressing the jurisdictional issue the parties agree that the appellant seeking to file this grievance appeal is a casual seasonal employee and they further agree that 29 *Del. C.* § 5903(17a) exempts such employees from classified service. The concept of classified State service and legislative exemptions therefrom are central to the resolution of this matter.

Chapter 59 of Title 29 and the State Merit System it establishes are "a system of personnel administration...governing the employees of the state in the classified service. (Emphasis added)" 29 *Del. C.* § 5902. The term "classified service" means all positions of State employment with certain listed exceptions. 29 *Del. C.* § 5903. One of the specific statutory exceptions is for casual seasonal employees. 29 *Del. C.* § 5903(17a).

The appellant, a casual seasonal employee, argues that notwithstanding an admitted exemption from the classified service, his right to bring this appeal premised on alleged discrimination for non-merit factors is found in the language of Merit Rule No. 19.0100 which provides:

Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political

or religious opinions or affiliations or because of race, national origin, age, sex, physical or mental disability, or other non-merit factor will be prohibited. (Emphasis added).

In other words, the appellant argues that exempt employees such as casual seasonal employees² can file and process a grievance under the Merit Rules as long as the employee alleges that some form of prohibited discrimination under Merit Rule No. 19.0100 as the basis for the grievance.

The Board does not agree. The Merit Employee Relations Board is created by Chapter 59 of Title 29 of the Delaware Code and, as noted above, has the powers, authority and duties specified therein. The general purpose of Chapter 59 is to establish a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under Chapter 13 of Title 19. (Emphasis added) 29 *Del. C.* § 5902. Merit Rule 2.000 defines a grievance as: “an employee complaint which remains unresolved after informal efforts at satisfaction have been attempted...”

The Merit Rules also define the term employee as “Any person legally holding a position in the classified service...” Merit Rule No. 2.000 Definitions.

The Board notes that in some cases persons actually hired into positions in the classified service do not always have full recourse to the grievance process of Chapter 59 of Title 29 and the Merit Rules. For example, an employee in the classified service who is serving a probationary period does not have the right, under the Merit Rules, to appeal the decisions of appointing authorities not to retain their services “except in some cases of discrimination on the basis of non-merit factors.”

²Other State employees exempted from classified service include, for example: Judges and other members of the State judiciary (29 *Del. C.* § 5902(16); All employees of the University of Delaware and Delaware State University (29 *Del. C.* § 5902(13); and Deputy Attorneys General (29 *Del. C.* § 5902(7);

Merit Rule No. 11.0500. These probationary employees do have the benefit of Merit Rule No. 19.0100 but they are not exempted from the classified service as are casual seasonal employees.

The statutory provision in Chapter 59 of Title 29 which addresses discrimination provides: "No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or be in any way favored or discriminated against with respect to employment in the classified service because of political or religious opinions or affiliations or race. (Emphasis added). 29 *Del. C.* § 5953. This statutory provision may help explain the use of the term "any person" in the prohibition against discrimination which is found in Merit Rule No. 19.0100.

It would not be technically correct to prohibit discrimination against "any employee" in Merit Rule 19.0100 in as much as the statutory provision contemplates the inclusion of "applicants" who are not yet employees in the Merit System. However, such persons are applicants for employment in the classified service which the grievant, as a seasonal casual employee, is not. It is not appropriate to stretch the term "any person" in Merit Rule No. 19.0100 beyond the reach of the classified service to embrace every State employee even those the General Assembly has statutorily exempted from the application of the Merit Rules by virtue of their exclusion from classified State service. In the view of the Board, the Merit Rules can not and do not extend the protections of the Merit System grievance process to non-merit employees which the General Assembly has expressly excluded from the classified service.

By dismissing this appeal by a seasonal casual employee the Board does not condone discrimination against either classified or exempt employees on the basis of non-merit factors nor on any other prohibited ground. Rather, the Board's decision is a determination that the existing Merit System and Merit Rules do not provide a forum for addressing such matters through the grievance

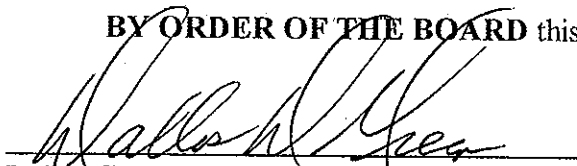
process in the case of a State employee who is statutorily exempted from classified service and thus from the grievance process of the Merit System. Employees statutorily exempted from the classified service and the Merit System have other avenues to pursue allegations of discriminatory treatment including the Equal Employment Opportunity Commission and various State and Federal courts.

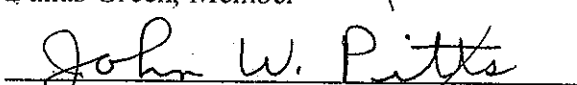
Simply stated, casual seasonal employees occupy non-merit positions. They have been specifically exempted by the General Assembly from the classified service and have no standing to grieve under the Merit System Rules even when the grievance is based upon alleged discrimination.

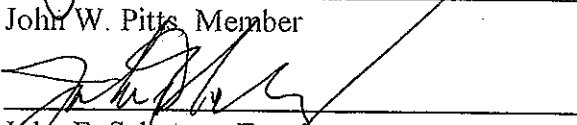
ORDER

The grievance appeal in Docket No. 00-01-194 filed by a casual seasonal employee of the Office of Information Systems is not within the jurisdiction of the Board and, for the reasons stated above, is **DISMISSED** on motion of the Board. **IT IS SO ORDERED.**

BY ORDER OF THE BOARD this 20th day of April, 2000.


Dallas Green, Member


John W. Pitts, Member


John F. Schmutz, Esquire

APPEAL RIGHTS

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: April 27, 2000

Mailed by: [Signature]

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Merit Employee Relations Board

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member